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Crowned Encyclopedia

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Philippe Lagassé

Crowned Encyclopedia*

Anne Twomey's *The Veiled Sceptre* is a career-defining book. Bringing together more than a decade of work on the role of heads of state in the Westminster system, Twomey's work presents us with a veritable encyclopedia of precedents and practices. No other book can claim to have gathered as much information about how heads of state in Westminster states operate and in what cases they may be called upon to exercise their so-called »reserve powers«, authorities that are exercised with personal discretion in exceptional circumstances. Indeed, the volume is so expansive and includes so many particular cases that it would be erroneous to see the book as a contribution to the literature on Westminster heads of state. The book is now the canonical text.

This does not mean that Twomey's interpretations will not be questioned. Nor does it mean that the book is above criticism, notably in terms of how it might be used by practitioners in individual jurisdictions. What it does imply, however, is that Twomey's analyses will be the standard against which others will be evaluated and assessed for the foreseeable future.

The Veiled Sceptre addresses the question of when and how Westminster heads of state exercise discretion over matters of constitutional significance. A few definitions and clarifications are in order here to appreciate the scope of Twomey's topic and study. The realms that have Queen Elizabeth II as their sovereign share the same natural person as the head of state. Queen Elizabeth II is at once the head of state of the United Kingdom and head of state of all her other realms. Since she only resides in the United Kingdom, however, many of her head of state functions are performed by vice-regal representatives, such as Governors Generals and subnational Governors (in Australian states) and Lieutenant-Governors (in Canadian provinces). Twomey's »heads of state« therefore include not only the Queen but these representatives as well.

Typically, moreover, Westminster states are understood to be those with Queen Elizabeth II as their monarch. Twomey, however, takes a broader approach in *The Veiled Sceptre*. In order to draw on a wider set of precedents and cases, Twomey made the decision to include former British colonies which are no longer realms, but which have retained aspects of the Westminster tradition, notably parliamentarism and a separation between a head of government who normally exercises power and a symbolic head of state who only exercises certain limited authorities in exceptional cases.

Twomey's choice to include former colonies that are no longer realms involves trade-offs. Studies of the Westminster system often limit themselves to the »core« states: Australia, Canada, New Zealand, and the United Kingdom. Focusing on these four allows for »most similar« case comparisons. Alongside the United Kingdom itself, these are former self-governing Dominions and the evolution of the Crown in their constitutions has been similar since the Statute of Westminster 1931. Accordingly, there is a degree of comfort in drawing on mutual practices and precedents within this closed circle when making decisions. Enlarging this group to include the smaller realms and former colonies has the benefit of including a greater number of precedents and cases. It also allows Twomey to examine cases where heads of state have had to deal with more complex emergencies and complicated situations than have arisen in the »core four«. As importantly, including this wider group ensures that heads of state and officials from these countries have access to a compendium of precedents to which they can refer; rather than being treated as second-tier Westminster-style states, *The Veiled Sceptre* places them on an equal footing in terms of the study of reserve powers. The drawback here is that precedents and principles drawn from one set of states may not be applicable to another set. Heads

* Anne Twomey, The Veiled Sceptre. Reserve Powers of Heads of State in Westminster Systems, Cambridge: Cambridge University Press 2018, xxxv + 875 p., ISBN 978-1-107-05678-7

of state in Australia and Canada may question the relevance of precedent from Fiji and Papua New Guinea, while those in Tuvalu may wonder if British practice provides them with sufficient guidance.

Yet Twomey does not claim that precedents from one situation should necessarily inform decisions in another comparable situation. Her purpose is to provide the information and to consider the principles and factors that led to the outcome in question. Moreover, when there is a dispute over what rules and principles apply, Twomey is careful to consider the differing arguments.

Twomey's analyses of the cases and precedents she discusses are presented in her opening chapter. She begins by distinguishing reserve powers, those that belong to heads of state and can occasionally be exercised with discretion, from prerogative powers more generally, those powers of the Crown or executive exercised by ministers that have not been provided by the legislature. As she notes, both reserve and prerogative powers can vary in terms of where they are sourced. In the United Kingdom and New Zealand, reserve and prerogative powers are generally sourced in the common law, though they may also be recognized by statute. Countries with written constitutions may have certain reserve powers as codified constitutional authorities, while others may still be sourced in common law. For instance, the power to dissolve parliament is a constitutional authority of the Canadian Governor General, whereas the power to prorogue the Canadian parliament is a common law power of the Crown. Still other states will have placed nearly all their reserve powers on a constitutional or statutory footing. The distinguishing factor, then, is the exercise of potential discretion on the part of the head of state. This leads Twomey to cover ten types of reserve powers, notably those related to the formation and exercise of governing power (advice to the head of state; appointment of the first minister; dismissal of governments; caretaker convention; rejection of advice; and the appointment and dismissal of vice-regal officers) and those related to the legislature (dissolution; summoning; prorogation; and royal assent).

Twomey identifies a series of rules and factors that shape how reserve powers are exercised. These include the principles of the rule of law, the separation of powers, necessity, and representative government. Arguably the most interesting of these for the cases that Twomey discusses in the book is the principle of necessity, which may demand that a head of state act contrary to the constitution or other principles, or to exercise powers they would not normally have, in order to bring a state back to constitutional validity. Next, Twomey discusses the principles of responsible government and constitutional conventions. These two sets of rules are the most widely debated and discussed in the literature on the Westminster system and the reserve powers. Twomey provides a high-level overview of these debates, as well as her own views on the matter. It is on the finer points of interpretation regarding these principles of responsible government and constitutional conventions that other scholars are likely to diverge from Twomey's assessment.

A recent example of this divergence was seen in the fall of 2019, when the question of whether the British government of Prime Minister Boris Johnson could advise the Queen to withhold royal assent to a bill passed by the Houses of Parliament arose. Twomey's discussion of the principles of responsible government and relevant historical precedents suggests that this possibility cannot be discounted. A key facet of responsible government is that the head of state exercises powers on the advice of responsible ministers. Since royal assent remains a reserve power of the Crown in the United Kingdom, ministers might advise the Queen to withhold that assent. Twomey's analysis of the relevant jurisprudence reinforces the fact that assent is granted on the advice of ministers, and she provides a number of reasons why this is the best way to understand how the power is exercised.

The events of the fall of 2019 led British public lawyers, such as Jeff King from University College London, to challenge this interpretation. For King and others, the granting of royal assent should be understood as an act of the Crown-in-Parliament, the Queen acting on the advice of the two legislative houses, not the Crown-in-Council, the Queen acting on the advice of ministers. Twomey considers this argument in her book, but demonstrates why she feels the standard notion of the Crown acting on the advice of ministers still holds. Ultimately, no advice to withhold assent was given, which made the argument academic. Yet this episode demonstrates how particular controversies will bring Twomey's work to the fore and lead to discussions of which principles and rules should apply in a given case. Whether public lawyers or

political scientists agree or disagree with Twomey's assessment in *The Veiled Sceptre*, there is little doubt that her interpretation will be the starting point of these discussions in the future.

As a tome of nearly 900 pages, it is difficult to do justice to *The Veiled Sceptre*. Encyclopedic in scope and ambition, the book sets a new standard for comparative studies of heads of state in the Westminster tradition. As importantly, it is a contribution that is likely to inform future decisions by heads of state, while being the book of record for those of the past.

■

Jan Julia Zurné

Norwegian Judges during the Second World War and Their Shortcomings*

Legal scholar Hans Petter Graver is fascinated by judges who undermine the rule of law by serving an authoritarian regime. Five years ago, he delved into this subject in his book *Judges against Justice. When the Rule of Law is under Attack*. Also in 2015, Graver published a study on the legal history of his native Norway during the Second World War. This book has now been translated into German, offering international readers the opportunity to acquire knowledge on this interesting example of how the National Socialist occupying forces and collaborationist leaders aspired to instrumentalise local judicial procedure and the judiciary during the Second World War – and how judges reacted to this.

The Norwegian case study forms both an addition and a sequel to Graver's previous work on judges. On the one hand, it adds depth to his more general reflections on the paradox of judges serving authoritarian regimes by exploring the case of Norway under German occupation. On the other hand, he places this case study in the context of judges' faults or shortcomings (»Richterversagen«) in National Socialist and other authoritarian regimes.

Graver paints a detailed picture of various aspects of legal life and practice in occupied Norway. Led by *Reichskommissar* Josef Terboven (and, from 1942 onwards, prime minister and collaborationist *Nasjonal Samling* leader Vidkun Quisling), the Norwegian state was placed under National Socialist rule. This had far-reaching consequences for judicial organisation and criminal proceedings on all levels of the Norwegian *Rechtsstaat*.

Graver's first focus is on the Supreme Court (*Høyesterett*). When the collaborationist Minister of Justice, Sverre Riisnæs, introduced measures in order to reform judicial procedures in the autumn of 1940, the Supreme Court pointed out that these actions lay outside the minister's competence. This response was inspired by the ambition to protect judicial independence, but had a much larger effect. In reaction, the regime forbade the Supreme Court to review the legality of measures taken by the occupying forces or the Norwegian puppet government. Moreover, the Supreme Court's members were punished by forced retirement from the age of 65 and up. This caused the entire body of judges to resign and paved the way for members of the *Nasjonal Samling* to take their places. The newly appointed judges were both more loyal to the regime and less qualified than their predecessors. They accepted their appointment either out of a sense of duty to serve their

* Hans Petter Graver, Der Krieg der Richter. Die deutsche Besatzung 1940–1945 und der norwegische Rechtsstaat, transl. by Melanie Hack, Baden-Baden: Nomos 2019, 337 p., ISBN 978-3-8487-5475-5